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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-

J. MICHAEL CARTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-

J. MICHAEL CARTER,

Petitioner,

- v. -

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner J. Michael Carter respectfully petitions that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on December 19, 1979.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears

in the Appendix of the petitioner Paul Luftig, Docket No. 79-1125 (filed January 18, 1980) to which the Court is respectfully referred. Page references to the opinion and judgment contained in this Petition are to the opinion as it appears in the Luftig Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on December 19, 1979. (A. 49a). On January 10, 1980, Mr. Justice Marshall extended the time for the filing of this petition up to, and including, February 17, 1980. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Can a defendant be properly convicted of aiding and abetting another (18 U.S.C. §2) when the district court, although properly requested to do so by defendant's counsel, refuses to instruct the jury that it must find that a principal committed the offense as part of

determining the accessorial liability of the defendant?

2. Does the impairment of the defendant's right to the proper exercise of his peremptory challenges as defined in Rule 24(b), Federal Rules of Criminal Procedure, by the prosecution's successful insistence in obtaining more such challenges than permitted by Rule require that an ensuing conviction be reversed?

3. May the federal conspiracy statute (18 U.S.C. §371) be properly interpreted to convict a defendant of conspiracy although there was no proof that he ever agreed to, had any knowledge of, or participated in one of the critical areas of the alleged conspiracy?

4. Is the rule of vicarious criminal liability (established in Pinkerton v. United States, 328 U.S. 640 (1946)) consistent with concepts of due process when it authorizes the conviction and punishment of a defendant for a crime as to which he has no personal participation or knowledge?

STATUTES AND RULE INVOLVED

Title 18, United States Code §2

> "§2. Principals
> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
> * * *"

Title 18, United States Code §371

> "§371. Conspiracy to commit offense or to defraud United States
> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
> * * *"

Federal Rules of Criminal Procedure Rule 24(b):

> "(b) Peremptory Challenges. If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly."

STATEMENT OF THE CASE

1. The Indictment

The indictment named three defendants, all of whom formerly were officers of the Franklin National Bank (hereinafter "Franklin"): Harold V. Gleason, former Chairman of the Board, Paul Luftig, former President and petitioner J. Michael Carter, one of many Senior Vice Presidents at Franklin.

The indictment contained fifteen counts, all but count fifteen named all three defendants.

The essence of the prosecution's case was the conspiracy count (count 1), which alleged a conspiracy among the three defendants, together with four alleged co-conspirators, Michele

Sindona, Carlo Bordoni, Peter R. Shaddick and Howard D. Crosse, to defraud the United States and to commit violations of specified federal statutes. These statutes were 18 U.S.C. §§1001, 1005 and 1014, and 15 U.S.C. §§78j(b) and 78ff, and the SEC's Rule 10b-5 (17 C.F.R. 240.10b-5).

The conspiracy count as a pleading sought to tie together two disparate events: (1) the false valuing of securities held by Franklin in order to avoid reflecting a loss of $5 million for the first quarter of 1974, and (2) the causing Franklin to enter into false and fictitious foreign exchange transactions in order to reflect a profit of $2 million for the first quarter of 1974.

Petitioner Carter was alleged to have participated in only one, the transfer of securities from Franklin's bond trading account to its bond investment account at cost, rather than at market value.

The indictment's allegations and the prosecution's claims that

the two transactions were connected gave rise to the major issue as to petitioner both before and during the trial: the prejudicial impact upon Mr. Carter resulting from the uniting of two disparate courses of conduct as the basis of the purported conspiratorial agreement, notwithstanding Mr. Carter's undisputed total lack of knowledge or invovlement with regard to one of those courses of conduct.

Counts 2 and 3 were the substantive counts relating to the securities transfers and the foreign exchange transactions, respectively. Each of these counts alleged a violation of 18 U.S.C. §1005. Count 3 was ultimately dismissed as to Mr. Carter due to a total lack of proof that he knew about or participated in anything having to do with foreign exchange matters.

Count 4 alleged a violation of 18 U.S.C. §1014 involving a loan by Franklin New York Corporation, Franklin's holding company (hereinafter "FNYC"), from Manufacturer's Hanover Trust

Company. The loan, in the amount of $35 million, was related to a proposed merger of FNYC with Talcott National Corporation. Since there was no proof that Mr. Carter knew about or had any participation in any way concerning this loan or the merger with Talcott, the District Court, with regard to Mr. Carter, ultimately submitted this count to the jury solely on the theory of conspirator's vicarious liability (Pinkerton v. United States, 328 U.S. 640 (1946)).

Finally, Counts 5 through 14 alleged in substance violations of Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. §78(j)(b)) and Rule 10b-5 (17 C.F.R. §240.10b-5). The theory of the allegations was that there was a 10b-5 violation because the defendants put into motion a financial statement which affected the market price of a publicly-traded security. There was no proof that there was any contact between the defendants and the purchasers named in the indictment.

2. Jury Selection

At the opening of the trial but prior to the examination of the prosecutive jurors, the District Court granted two additional peremptory challenges to the three defendants, to be exercised jointly. The prosecution immediately seized upon this and asked that its number of peremptory challenges be increased "proportionately".

Petitioner's counsel objected to granting additional peremptory challenges to the prosecution on the ground that there is no authority in the Federal Rules of Criminal Procedure or elsewhere to do so.

After reviewing the text of Rule 24(b), the District Court agreed that it had no express authority to grant the prosecution any additional peremptory challenges. It nevertheless granted the prosecution an additional challenge on the theory that the entire matter of jury challenges was within its discretion irrespective of the clear language of Rule 24.

The prosecution exercised its seventh challenge against a prospective

juror whom the prosecution apparently found unacceptable. The challenged prospective juror was replaced by someone who became a member of the jury which returned the verdict of guilty.

3. The Trial Proofs

During the nine-week trial the prosecution introduced testimony and exhibits covering widely disparate subject matters. The purported justification was the conspiracy count.

The prosecution's proof can be group conveniently into four distinct areas: (1) the foreign exchange transactions; (2) the Manufacturers Hanover loan; (3) the proposed merger of Franklin New York and Talcott National Corporation; and (4) the securities transfers.

Of these four categories, none involved petitioner except the last. Nevertheless, despite his pre-trial efforts, petitioner was required to sit through and ultimately defend against all of the prosecution's proof in all four areas. The

prosecution's proof on the areas of foreign exchange, the Talcott merger and the Manufacturers Hanover loan occupied many weeks of the trial and a substantial portion of the testimony. There were sixteen witnesses who testified about these three areas. None of them testified about petitioner in any way.

Indeed, while the testimony of several of these witnesses revealed a sordid tale of international financial intrigue involving the bribing of Italian bank examiners, the movement of large sums of money through Italian and Swiss banks, a titilating expose of the machinations of then-prominent Italian financier Michele Sindona, and outright fraud in the arrangement and consummation of foreign exchange transactions, petitioner's name was not so much as mentioned.

Petitioner's involvement in the subject matter of the trial concerned three transfers of domestic securities from the bank's trading account to the bank's investment account. As the testimony of one of

the prosecution's chief witnesses, Howard Crosse, made clear petitioner had no nefarious involvement with regard to two of these transfers. The prosecution's theory with respect to each of the three transfers was that market depreciation in certain securities held for the bank's own account was not properly reflected on the bank's earnings statement for the first quarter of 1974 as a result of the transfers. There was no dispute that transfers of securities from the bank's trading account to its investment account are not necessarily improper; rather, the dispute centered on the accounting principles applicable to such transfers.

4. The Instructions to the Jury

The jury was specifically told that a defendant could be found a member of the conspiracy without the prosecution being required to prove that he conspired to achieve all of the objects of the conspiracy. It was also instructed that it need not find that the defendant even knew of

all of the objects of the conspiracy.*

With regard to the substantive counts, the district court instructed the jury on both accessorial and conspirator's vicarious liability.

On the subject of aiding and abetting liability, the court refused to instruct the jury that before anyone could be considered as an aider or abetter it was first necessary to find that there was at least one individual who as a guilty principal committed the crime.

In instructing the jury on Pinkerton liability, the court,

*The following are excerpts from the instructions to the jury:

"Now, it is a law that a defendant can be convicted under a conspiracy count such as Count One without the Government proving that he conspired to achieve all of the objects alleged or to violate all fo the statutes or rule referred to.

A defendant can be convicted under Count One if the government proves beyond a reasonable doubt that he conspired to achieve only one of the criminal objects alleged, conspired to violate only of the substantive statutes referred to."

although it had already stated that the jury need only find that Mr. Carter conspired to violate §1005 in order to convict him of conspiracy, inconsistently went on to tell the jury that Mr. Carter could be convicted under Pinkerton on substantive counts alleging that he violated 18 U.S.C. §1014 and 15 U.S.C. §78(j)(b). In effect, the court told the jury that it could find that these substantive counts were within the "scope of the conspiracy" even though the conspiracy did not embrace violations of the very statutes alleged in those counts to have been violated.

REASONS FOR GRANTING THE WRIT

Each of the issues presented by the petitioner is one that recurs frequently in the administration of criminal justice in the federal courts. The issues of accessorial and conspiratorial liability are involved in virtually every federal prosecution involving more than one defendant. Indeed, the Court has recently granted certiorari in Standefer

v. United States, No. 79-383 on a question of accessorial liability which in a somewhat different but nevertheless related context is involved in this case. The issue of a proper interpretation of Rule 24(b), Fed.R.Crim.P. governing the selection of juries is one of universal application.

1. The Federal Aiding and Abetting Statute (18 U.S.C. §2(a)) is Not Properly Applied When the Trial Court Refuses to Instruct the Jury That It Must Find A Crime Was Committed By Others As Part of Determining the Accessorial Liability of the Alleged Aider And Abetter.

On January 7, 1980, this Court granted certiorari in Standefer v. United States, No. 79-383. Standefer involves an interpretation of the role of the principal in the aiding and abetting statute, 18 U.S.C. §2(a). In Standefer, the principal had been acquitted of the substantive crime at a separate trial and the issues before this Court include whether the acquittal of the principal deposes of an essential element of

accessorial liability.

This case presents an issue of related (and in our view, equal) importance, namely, may a defendant be convicted of aiding and abetting a substantive offense when the district court refuses to instruct the jury that it must find that one or more individuals committed the substantive offense, that is, acted as principals before determining the accessorial liability of others.

It is fundamental, as this Court has held, that there can be no accessorial liability unless a crime has been committed by some other individual. Shuttesworth v. City of Birmingham, 373 U.S. 262 (1963). The necessity of a guilty principal was recognized by this Court as early as 1827, United States v. Gooding, 25 U.S. 460, 469 (Story, J.). The same interpretation should be applied to the aiding and abetting statute (18 U.S.C. §2(a)) which was passed in 1909.

The district court in this case refused to instruct the jury

that before anyone could be an aider and abetter, it was necessary for them to find that there was at least one individual who committed the crime.*

---

*The aiding and abetting instruction given was the following:

> "Now, let me discuss the concept of aiding and abetting. Under the aiding and abetting statute, it is not necessary that you find that a defendant literally did the criminal act in order to be guilty. Here, in connection with Counts two and three, it is not necessary that you find that a defendant literally made the false entry alleged in the indictment. It is sufficient if you find that the false entry referred to in Count two or Count three was made by the device alleged and that the defendant you are considering did one of the things referred to in the aiding and abetting statute, that is, aided, abetted, counseled, commanded, induced, procured, or caused the making of the false entry.
>
> "All these alternative words are familiar except possibly the word abet, which simply means to incite or advocate.

Aiding and abetting is only a theory of criminal liability. It is not an offense in itself. Arising from 18 U.S.C. §2(a), the statute simply punishes as a principal one who aids another in the commission of a crime.

The Court of Appeals held the instructions adequate.

While the Court of Appeals sought to distinguish the situation

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(Cont'd.)

> "So, a defendant is guilty of aiding and abetting the commission of a criminal act if he causes the act or if he commands or induces the act or if he counsels or advises another in committing the act or if he assists in having the criminal act committed.
>
> "In order for a defendant to be guilty of aiding and abetting in connection with Count two or Count three, he must have done one of the things just mentioned, and he must also have the criminal state of mind referred to in the third and fourth elements, which I'll come to now."

presented in United States v. Standefer, Dkt. No. 78-1909 (3d Cir., Aug. 10, 1979), cert. granted January 7, 1980, (A. 29a), this case nevertheless presents a companion question to that presented there: namely, whether a jury instruction is adequate which does not even require the jury to find that the offense was committed by others before considering accessorial liability?

The prejudice to the petitioner is clear. He could not under any theory be considered a principal; and under no stretch of the legal imagination could he have aided and abetted many of the co-conspirators. Yet, these possibilities, excludable as a legal proposition, were not excluded from the jury's consideration by the court's instructions.

In the event that this Court in Standefer v. United States, supra, finds that the status of the principal

is crucial to a determination of accessorial liability, it follows that it is error to fail to inform the jury that it must find a principal committed the crime before considering accessorial liability. Even if the Court were to determine that the status of the principal were not determinative, it would still be obligated to decide precisely what the jury is required to find before accessorial liability can attach. That is the issue posed by the petitioner herein. In all events, a writ of certiorari should issue in this case to review the correctness of the decision below.

2. The Impairment of the Defendant's Right to the Proper Exercise of His Peremptory Challenges By the Prosecution's Successful Insistence In Obtaining More Peremptory Challenges Than Permitted by Rule 24, Fed.R.Crim.P. Require That the Ensuing Conviction Be Reversed.

The right of jury trial is fundamental. Duncan v. Louisiana, 391 U.S. 145 (1968). It is one of the few rights guaranteed in two

separate portions of the Constitution: Article III, §8 and the Sixth Amendment.

The right would be of little value if the defendant did not have a significant part to play in the selection of the jury under rules which are universally applied. Indeed, the jury selection process is one of the most critical portions of the trial. In that critical process of selection the peremptory challenge is "one of the most important of the rights secured to the accused," Pointer v. Texas, 151 U.S. 396, 408 (1894), "a necessary part of trial by jury," Swain v. Alabama, 380 U.S. 202, 219 (1965) and has its antecedents in the common law. Lewis v. United States, 146 U.S. 370, 376 (1892).

The peremptory challenge is especially important in federal prosecutions where it is the almost universal practice for the court to conduct the examination of the prospective jurors, Rule 24(a). This voir dire is necessarily more limited than than which would be conducted by the attorneys themselves.

It has been estimated that the average voir dire in typical federal criminal trials lasts only approximately 70 minutes. Proposed Amendments to the Federal Rules of Criminal Procedure: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 6 (1977) (testimony of Jay Schulman, Coordinator, National Jury Project).

The number of peremptory challenges to which the defense and prosecution are entitled is governed by Federal Rule of Criminal Procedure 24(b), which provides that in non-capital felony cases the prosecution is given six peremptory challenges and the defense, ten.

Rule 24(b) does not authorize the granting of additional peremptory challenges to the prosecution. As recently as 1977, the Congress expressly disapproved a proposed amendment to Rule 24(b) that, among other things, would have permitted the trial court to grant additional peremptory challenges to both the prosecution and the defense in multi-defendant cases. Pub.L. 95-78, §2(c), July 30, 1977,

91 Stat. 320, effective October 1, 1977. Thus, there is no doubt that both the letter and spirit of Rule 24(b) were violated in this case.

The decision of the Court of Appeals acknowledges the clear violation of Rule 24(b) -- "* * *the court's action was improper* * *" (A. 48a). However, it concluded that reversal was not warranted "* * *in the absence of prejudice to the defendants." (A. 48a).

There is little doubt that the conduct of the prosecution impaired the defendant's exercise of his peremptory challenges. The extra peremptory challenge given the prosecution had an impact on the entire selection process; and directly affected the exercise of the crucial last two challenges of the defendants. In this case, the peremptory challenges were exercised in rounds. The defense exercised two challenges in each of the last two rounds. Had the prosecution not received the extra challenge, the defense would have been entitled to exercise two challenges in each

round to the prosecution's one. Here the prosecution was provided with a substantial advantage since it would under any system strike last, and it was, with the unauthorized challenge given it here, striking challenge for challenge with the defense on the last two rounds. It exercised its extra peremptory challenge against a juror who was satisfactory to the defendants.

The prosecution, like every other litigant, exercises its peremptory challenges against prospective jurors who, in its view, are either unfavorable to the prosecution or favorable to the defendants. Thus, in this case, the prosecution's use of the extra peremptory challenge against one of the veniremen (who was satisfactory to the defendants) deprived the defendants of a juror who, correctly or incorrectly, was viewed as hospitable to the defendants. In a criminal case, since only one juror voting for acquittal would preclude a conviction, the magnitude of an extra challenge cannot be denied.

By requiring a showing of prejudice the Second Circuit has placed itself in conflict with this Courts' decision in Swain v. Alabama, 380 U.S. 202, 219 (1965) where it was held:

> "The denial or impairment of the right is reversible error without a showing of prejudice, Lewis v. United States, supra; Harrison v. United States, 163 U.S. 140, 16 S.Ct. 961, 41 L.Ed. 104; cf. Gulf, Colorado & Santa Fe R. Co. v. Shane, 157 U.S. 348, 15 S.Ct. 641, 39 L.Ed. 727."

This Court has never required a demonstration of prejudice when the jury selection process has been shown not to be in accordance with constitutional and statutory requirements. Taylor v. Louisiana, 419 U.S. 522 (1975) (male defendant permitted to challenge exclusions of females from petit jury): Duren v. Missouri, 439 U.S. 357, (1979) (same); Peters v. Kiff, 407 U.S. 493, (1972) (white defendant permitted to challenge exclusion of Negroes who had been systematically excluded from petit jury service).

The decision below also creates a conflict in principle with the First Circuit. In New England Enterprises, Inc. v. United States, 400 F.2d 58 (1st Cir. 1968), cert. denied, 393 U.S. 1036 (1969), the First Circuit recognized that it would almost never be possible for a defendant to demonstrate that the exercise by the prosecution of an unauthorized number of peremptory challenges resulted in prejudice. "Since it would rarely be possible for a defendant to prove prejudice, proper objection to unlimited challenges should be grounds for reversal. If these were not so, there would be no sanction insuring adherence to the rule by trial courts." Id. at 69.

There is no method by which one could ascertain with certainty whether the veniremen who are dismissed as a result of the prosecution's unauthorized peremptory challenges would have been more suitable, less biased jurors than the prospective jurors who take their places. Indeed, it is impossible to determine which

venireman ultimately would have been accepted or rejected as jurors if the prosecution had not been granted an extra peremptory challenge, since each time the prosecution exercises a challenge, it does so only after considering the number of unexercised challenges it has remaining.

In addition, the decision of the Second Circuit if allowed to stand abrogates the legislatively mandated and desirable uniformity in jury selection procedures. The allocation of the number of peremptory challenges is a legislative decision which is intended to govern all trials uniformly throughout the country. Consistency in jury selection throughout the federal court system is clearly desirable in the interest of stability and uniformity. There is little to be gained when trial and appellate courts depart from the command of Rule 24 since the danger of prejudice is great. The trial court here, at the prosecution's urging, simply ignored the rule and unauthorizedly

empowered itself to disrupt the Congressionally mandated balance and give the prosecution an additional challenge.

Unless such conduct constitutes reversible error without a showing of prejudice, the provisions of Rule 24(b) are rendered meaningless and unenforceable. Cf. New England Enterprises v. United States, supra, 400 F.2d at 69. The opinion of the court seems to invite prosecution and district courts to condition a defendant's right to additional peremptory challenges on the prosecution obtaining more, in direct contravention of Rule 24. (A. 48a, n.20). No Rule of Criminal Procedure should be able to be violated with impunity.

The substantial right to a trial by a jury selected in accordance with the Federal Rules of Criminal Procedure mandates that it be enforced uniformly throughout the federal system. The opinion of the court below unless corrected by this Court runs counter to this desirable goal.

This issue is one of recurring importance in the administration of

federal criminal justice. It is involved in virtually every multiple-defendant trial in the federal courts. This Court has never interpreted Rule 24 since it was promulgated in 1946. It is therefore appropriate that the petition be granted in this case.

3. The Federal Conspiracy Statute (18 U.S.C. §371) Cannot Properly Be Interpreted To Convict A Defendant of Conspiracy When There Was No Proof That He Ever Agreed To, Had Any Knowledge of, or Participated In One of the Critical Areas of the Alleged Conspiracy.

Conspiracy is perhaps the most often charged federal crime. There is virtually no multi-defendant indictment which does not include a claim of conspiracy. While once described by this Court as the "extraordinary" crime, Krulewitch v. United States, 336 U.S. 440 (1949), it has by usage become anything but.

The frequency of use has brought with it in the lower courts an expansion of the doctrine and its applications. To date this expansion has not been

reviewed by this Court but was presciently predicted by Justice Jackson in Krulewitch v. United States, 336 U.S. 440, 445 (1949) when he, quoting Judge Cardozo, wrote that the law of conspiracy "exemplifies the 'tendency of a principle to expand itself to the limit of its logic'".

One of the most disturbing expansion in the thirty years since Krulewitch is presented by this case, namely, can a defendant be found by a jury to be a member of a conspiracy when his agreement does not embrace the full scope of the conspiracy? Since Krulewitch, this Court has not specifically addressed the agreement requirement in federal conspiracy prosecutions.

In this case, the jury was specifically told that a defendant could be found a member of the conspiracy without the jury finding that he conspired to achieve all of the objects of the conspiracy. The jury was also instructed that it need not find that the defendant

even knew of all of the objects of the conspiracy.* The Court of Appeals specifically approved this expansion of the law of conspiracy. (A. 19a).

The error of the theory of conspiracy embodied in the instructions may be demonstrated in several ways. First, it is inconsistent with the basic principles of the law of conspiracy. Second, it embodies a concept of strict liability which is the antithesis of the criminal law.

The theory of the instructions cannot be squared with the fundamental characteristics of the law of conspiracy. Almost all of the characteristics of the law of conspiracy arise from one bedrock principle, namely, that by agreeing to become a member of the conspiracy, each of the conspirators has designated all of the other parties to the agreement as his agent. The conspirators are tied together by their mutual agreement. The co-conspirator

*The relevant portions of the trial court's instructions to the jury are quoted at page 13, supra.

declaration rule now embodied in Evid.R. 801(d)(2)(E), arises from the same principle. Anderson v. United States, 417 U.S. 211 (1974). The broad joinder provisions allowed conspiracy prosecutions are based upon it. The fulfillment of the overt act requirement by any one conspirator and the running of the statute of limitations from the last overt act of any one conspirator are other embodiments of the same principle. The development of the theory of wheel-spoke and chain conspiracies is necessitated by the requirement that the co-conspirator be united by a mutual agreement. In fact, the totality of the law of conspiracy makes sense and is internally consistent only if the requirement remains that all of the defendants must be found to have entered into a single agreement, thereby simultaneously defining all of their mutual objectives and liabilities.

All of these corrolaries of the law of conspiracy are totally inconsistent with the theory embodied

in the court's instructions to the jury in this case. Unless one knows of, and becomes part of, an agreement that embraces all of the objects common to all of the alleged co-conspirators, it cannot rationally be concluded that one deputized another to speak for him or to commit substantive offenses in his behalf.

The instructions in effect imposed strict liability upon a conspirator for all that others do irrespective of whether it falls within the conspiratorial agreement.

Conspiracy is a crime requiring specific intent. Ingram v. United States, 360 U.S. 672 (1959). In this case the conspiratorial agreement was defined in the indictment to embrace the violation of specified statutes. In such situations, the conspirators must be proven to have the same intent as would be required for a commission of the substantive crime, United States v. Feola, 420 U.S. 671 (1975); Ingram v. United States, supra.

Strict liability is the anti-thesis of a specific intent crime.

Sandstrom v. Montana, ___ U.S. ___, 99 S.Ct. 2450 (1979); United States v. United States Gypsum Co.. 438 U.S. 422, (1978); Morissette v. United States, 342 U.S. 246 (1952). No federal criminal statute of which we are aware explicitly adopts a strict liability standard. Historically, intent has been required in criminal statutes, as expressed most eloquently by Justice Jackson in Morissette v. United States, 342 U.S. 246, 250 (1952):

> "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."

Contrary to these fundamental principles, the theory embraced in the instructions to the jury in this case allowed it to convict Petitioner on a theory urged by the prosecution that would make him liable on the basis that he was responsible for all that went on in the conspiracy

although there was a total absence of proof that he had ever agreed to, had any knowledge of, or participated in one of the critical areas of the alleged conspiracy.

The issue of the proper scope of the law of conspiracy, so often and so prevalently involved in the federal prosecutions, should not proceed further with a definitive review by this Court.

4. The Rule of Vicarious Criminal Liability (Established in Pinkerton v. United States, 328 U.S. 640 (1946)) As Applied In This Case Punishes A Defendant For A Crime As To Which He Has No Participation Or Knowledge Save That The Jury May Have Concluded That He Is A Conspirator.

Only once in its history has this Court established a theory of vicarious criminal liability for serious crime. That occurred thirty-three years ago in Pinkerton v. United States, 328 U.S. 640 (1946). The theory was promulgated over the dissent of Justice Rutledge who described it as Draconian and found that it violated the double jeopardy provisions of

the Fifth Amendment.

The Pinkerton doctrine makes a conspirator responsible for all substantive offenses committed by co-conspirator during the conspiracy, even when that party does not participate in the substantive offense or have any actual knowledge of it.

Since its promulgation by this Court, the theory of vicarious criminal liability has had a checkered history. It has been rejected outright by some states, see, e.g., New York People v. McGee, ___ N.Y.2d ___ (December 17, 1979) where the Court held (26 Cr.L.Rep. 2371-72):

> "* * * But it is repugnant to our system of jurisprudence, where guilt is generally personal to the defendant (see Sayre, Criminal Responsibility for the Acts of Another, 43 Harv.L.Rev. 689), to impose punishment, not for the socially harmful agreement to which the defendant is a party, but for substantive offenses in which he did not participate (Commonwealth v. Stasiun, 349 Mass. 38; see, generally, 56 Yale L.J. 356).
>
> "We refuse to sanction such a result and thus decline to follow the rule adopted for

> federal prosecutions in Pinkerton v. United States. Accessorial conduct may not be equated with mere membership in a conspiracy and the State may not rely solely on the latter to prove guilt of the substantive offense."

It was rejected by the Brown Commission in its draft proposed Federal Criminal Code. 1 National Commission on Reform of Federal Criminal Laws, Working Papers 155-57 (1970). It has been criticized by the framers of the Model Penal Code (Model Penal Code §2.04, Comments (Tent. Draft No. 1 (1953)):

> "Law would lose all sense of just proportion (if, based on conspiracy, a defendant) can be held accountable for thousands of offenses that he did not influence at all."

This Court has not reviewed the theory since its decision in Nye & Nissen v. United States, 336 U.S. 613 (1949).

The concept of criminal liability on status alone is alien to the Anglo-American system of criminal justice. Morisette v. United States, 342 U.S. 246 (1952); United States

v. United States Gypsum Co., 438 U.S. 422 (1978); United States v. Bailey, ____ U.S. _____ (January 21, 1980).

The present case illustrates the extent to which the concept has been carried. The district court here instructed the jury that the substantive offense need not be part of the conspiratorial agreement since it permitted the jury to consider the petitioner's liability on charges that had been expressly excluded from the conspiracy count.

The Pinkerton theory of vicarious criminal liability should be re-examined by this Court following over thirty years of experience with it. This case provides an ideal opportunity within which to do so and upon such re-examination, the concept should be disregarded.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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